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Supreme Court, U.S.
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No. 00-1934

IN THE

Supreme Court of the United States

AMERICAN GENERAL FINANCE, INC.,
MERIT LIFE INSURANCE CO., and
YOSEMITE INSURANCE COMPANY,

Petitioners,

v.

MABLE BRANCH,

Respondent.

On Petition for a Writ of Certiorari To the Supreme Court of Alabama

AMICI CURIAE BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICAN BANKERS ASSOCIATION, CONSUMERS BANKERS ASSOCIATION, AND THE FINANCIAL SERVICES ROUNDTABLE IN SUPPORT OF PETITIONERS

STEPHEN M. TRUITT
Counsel of Record
DANIEL I. PRYWES
PEPPER HAMILTON LLP
600 Fourteenth Street, N.W.
Washington, DC 20005
(202) 220-1200

STEPHEN G. HARVEY
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
(202) 835-9810

Attorneys for *Amici Curiae*
American Financial Services Association,
American Bankers Association,
Consumers Bankers Association, and
The Financial Services Roundtable

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STATEMENT OF INTEREST

The American Financial Services Association ("AFSA") was established in 1916, and is the national trade association for market-funded providers of financial services to consumers and small businesses. These providers offer an array of financial services, including unsecured personal loans, automobile loans, home equity loans, and credit cards through specialized bank institutions. Since 1916, the membership of AFSA has grown to include over 500 companies that are in the business of serving the credit needs of consumers and small businesses.[1] Many of AFSA's members incorporate arbitration clauses in their loan agreements, and some but not all AFSA members include clauses providing that disputes over arbitrability are to be decided by the arbitrators.

The American Bankers Association ("ABA") is the principal national trade association of the commercial banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes – money center, regional and community banks. ABA members hold approximately ninety-five percent of the domestic assets of United States banks. ABA members regularly include arbitration agreements in their loan and other contracts.

The Consumer Bankers Association ("CBA") is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home

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[1] This *amici* brief was authored by the undersigned counsel. No monetary contribution has been made to the preparation or submission of this brief by any person or entity other than AFSA. Petitioner American General Finance, Inc. is a member of AFSA, but has not contributed toward preparation or submission of this brief. Each of the parties has consented to the filing of this brief by *amici*. Copies of the consent letters have been filed with the clerk.

equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion.

The Financial Services Roundtable ("Roundtable") consists of 100 of the largest integrated financial services companies in the United States. Established in 1912, the Roundtable delivers respected leadership on regulatory management and provides superior technology leadership in the areas of setting standards, enhancing consumer privacy and security and rationalizing infrastructure.

The ABA, the AFSA, the CBA and the Roundtable frequently appear as *amici curiae* in cases raising issues of widespread importance to the consumer finance industry.

SUMMARY OF THE ARGUMENT

Judicial hostility to arbitration has taken many forms, despite the Federal Arbitration Act's (the "FAA" or "Act") purpose to promote use of arbitration. Increasingly, courts are resisting arbitration agreements contained within standard, form contracts – such as consumer loan contracts – on grounds that the terms of the arbitration agreements are "unconscionable." Objections to arbitration agreements in standard form contracts have been based on a variety of procedural and substantive factors, including claims that: individuals have no choice because of the prevalence of arbitration agreements by other lenders; the arbitration provisions are inadequately explained; the arbitration fees are unreasonable; a distant location specified for the arbitration is unfair; there is no mutuality of remedy; the arbitration rules are

biased against the individual; or damages to claimants are unfairly limited.

This case presents important and recurring issues about (1) what factors may properly be considered in deciding such "unconscionability" challenges, and (2) who should decide the issue when the arbitration agreement contains an "arbitrability" clause stating that disputes over arbitrability should be decided by the arbitrators. The Alabama Supreme Court decision conflicts with rulings of other state supreme courts, as well as with this Court's rulings in *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), and *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995).

First, the Court should review the ruling of the Alabama Supreme Court to establish that neither the widespread prevalence of arbitration clauses in an industry, nor "arbitrability" clauses, may be considered to be indicia of unconscionability. The Alabama Supreme Court violated this principle, as have other courts in the course of invalidating arbitration agreements as unconscionable. Many courts, however, recognize that arbitration clauses are not, by themselves, an indication of unconscionability. This latter view is the correct one, and is compelled by this Court's prior rulings that the Act's pro-arbitration policies extend fully to consumer contracts. Review is warranted because state supreme courts disagree on how to weigh the prevalence of arbitration agreements when evaluating claims of unconscionability, and the resulting uncertainty threatens to frustrate the Act's goal of promoting uniform use of arbitration in the context of consumer-loan contracts and a wide variety of other standard contracts that incorporate an agreement to arbitrate disputes.

Second, the Court should review the ruling below because it is the latest in a wave of state supreme court decisions that

have ignored or misconstrued this Court's decisions respecting "who" decides questions of arbitrability. The Alabama Supreme Court proceeded on its own to decide that an arbitration agreement was unconscionable, despite the presence of an "arbitrability" clause stating that such disputes should be decided by the arbitrators. Under the Court's *First Options* ruling, and the ruling in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), such an "arbitrability" clause should be enforced where, as here, it is expressed in clear and unmistakable terms and where there was not even an allegation (much less any finding) that the clause was unconscionable in its own right.

ARGUMENT

I. THE COURT BELOW FASHIONED A SPECIAL TEST TO INVALIDATE AN ARBITRATION AGREEMENT BASED ON THE PREVALENCE OF SUCH AGREEMENTS IN AN INDUSTRY SECTOR AND BASED AS WELL ON OTHER ARBITRATION CONTRACT PROVISIONS WHICH THIS COURT HAS DECLARED TO BE ALLOWABLE UNDER THE FEDERAL ARBITRATION ACT

In *Moses H. Cone Memorial Hosp. v. Terminal Constr. Co.*, 460 U.S. 1, 24 (1983), and *Southland Corp. v. Keating*, 465 U.S. 1, 12, 16 (1987), this Court clarified that state law, statutory or judge-made, cannot nullify the important goals of the Federal Arbitration Act. That Act evinces Congressional recognition that arbitration can resolve disputes at less cost while sacrificing no basic fairness to either party to the agreement. Thereby commerce is promoted. To gain this benefit, arbitration agreements were put on the same footing as other contracts, that is, made enforceable. Until the passage of the Act, many states refused to enforce such agreements, owing

to "centuries of judicial hostility" that the Act was intended to reverse.[2]

As with many important legislative declarations, the full beneficial sweep of the FAA was not immediately realized. Both legislative and "judicial hostility" to arbitration resurfaced seeking to undercut federal policy by special legislative requirements applicable only to arbitration clauses[3] and judicial gloss restricting the enforceability of such clauses.[4] This Court has resisted such developments in a number of cases and it is time to do so again.

The Alabama Supreme Court applied state law to invalidate an arbitration clause it found subject to the Federal Arbitration Act. In so doing, the court developed a special version of Alabama unconscionability rules which apply to arbitration clauses and them alone. According to the court, "the only substantive issue" before it was whether "the arbitration clauses were, themselves, unconscionable." App. 21a.[5] In answering this question, the court looked to Alabama's "two-pronged" test generally determining when contracts are unconscionable: "(1) terms that are grossly favorable to one party that has (2) overwhelming bargaining power." *Id.*

As to the first prong of the test, the court initially stated that the "breadth of the clause" itself was an index of

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[2] *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974).

[3] *See Doctor's Assocs. Inc. v. Cassarotto*, 517 U.S. 681 (1996), invalidating Montana law conditioning an arbitration agreement's enforceability on compliance with a "first page notice requirement."

[4] *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

[5] References to "App." are to the Appendix to the Petition for Certiorari.

unconscionability. App. 22a. Thus, broad arbitration clauses – those that refer all or most disputes to the arbitrator for decision – are inherently suspect. Secondly, if the clause refers "threshold issues of arbitrability" to the arbitrator as well, this is further evidence that the first prong of Alabama's test is met. *Id.*[6]

These two badges of unconscionability under the first prong of Alabama's test – breadth of the arbitration clause and reference of arbitrability issues to the arbitrator for decision – apply to arbitration clauses and them alone. Accordingly, the formulation of this "prong" of Alabama's test is not a general part of its unconscionability law, but is peculiar to arbitration agreements and them alone.

On the "breadth" issue, the more that is committed to arbitration by contract, the more likely the clause is to be tainted, in the court's view. This cannot be squared with the policies of the FAA and is completely hostile to encouraging arbitration. The Act declares arbitration clauses to be enforceable, not just "narrow" arbitration clauses. An analysis based on the view that a broad arbitration clause is more "suspect" than a narrower one negates the Congressional policy declaring such agreements enforceable, *per se*.

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[6] The court also stated that the limit on recovery of punitive damages, which was also in the arbitration clause, made the arbitration clause itself further suspect. The court did not explain why the arbitrator could not determine that this limit was valid or not under Alabama law. Accordingly, the court's observation presents no issue regarding the clause itself: the limit must be regarded as a party agreed rule of decision independent of the arbitration clause. As such, its inclusion goes to the validity of the contract as a whole, not the propriety of the arbitration clause itself. *See Gannon v. Circuit City Stores Inc.*, 2001 U.S. App. Lexis 18713 (8th Cir. Aug. 17, 2001).

The validity of an arbitration clause's reference of arbitrability itself to the arbitrator for decision – the second indicium of unconscionability according to the court below – was confirmed by this Court in *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995). This is what the clause here did. What is permitted by this Court's *First Options* decision cannot be undone by state law. The Supreme Court of Alabama, by converting activity protected under the FAA into a badge of unconscionability, runs directly afoul of *Moses H. Cone* and *Southland*, which hold that state law and procedure may not negate the FAA.

When the court proceeded to the second prong of Alabama's unconscionability test, "overwhelming bargaining power," it adopted a rule that categorically dooms standardized form arbitration clauses which, because of their popularity, are widely used.[7] According to the court, Alabama's "no-meaningful-choice" test is satisfied whenever the consumer faces an industry providing a product under form contracts which routinely include an arbitration clause along with other standardized clauses (acceleration, choice of law, attorney fees, etc.). Nothing further was required to establish that plaintiff "had no meaningful choice" and, thus, that the second prong of Alabama's unconscionability test was met with no further showing. App. 27a.

This aspect of the court's ruling particularly concerns *amici*. Prevalence of arbitration clauses in standardized

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[7] The variety of challenges to arbitration terms in consumer loan contracts are described in Alan S. Kaplinsky & Mark J. Levin, *Survey: Consumer Financial Services Arbitration: Current Trends and Developments*, 53 Bus. Law. 1075 (May 1998); and Steven J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 Wake Forest L. Rev. 1001, 1001-02 (1996).

contracts can neither brand an arbitration clause as invalid nor be an indispensable step in an argument lending to invalidity. *Amici's* members use standardized loan and related documentation which contain arbitration clauses. Wide use of such forms reduces transaction costs, avoids discrimination in loan terms, and benefits both the lenders *and* the borrowers as well. Courts considering whether the use of arbitration clauses in form contracts is valid have generally upheld these clauses.[8] Thus, both case law and the FAA policy repeatedly recognized by this Court favoring enforcement of arbitration agreements cannot be unraveled by state law analyses which employ the very success of such agreements *against* their enforceability.

The analysis of the court below simply ignored this Court's decisions which permit and encourage exactly what it condemned: broad arbitration clauses which can include reference of arbitrability issues themselves to an arbitrator for decision. By seizing on the wide acceptance of arbitration as a dispute resolution mechanism as a reason for throwing the parties back into the court system, the court below has achieved a result that can only be described as self-defeating: once the Congressional policy of encouraging arbitration is achieved, arbitration agreements are to be struck down. More importantly, it is directly contrary to this Court's decisions and

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[8] *See Chlor & Andre v. Piper*, 261 Mont. 143 (S.C. 1993) (arbitration clause enforceable even when included in an adhesion contract), and *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W. 3d 335 (Ky. 2001), 2001 Ky. App. LEXIS 60 (Ct. App.) (inclusion of the arbitration clause was not abusive or unfair); *In re Oakwood Mobile Homes, Inc.* 987 S.W. 2d 571 (S.C. Tx 1999) (arbitration clause in adhesion contract not *per se* invalid).

Contrary: *Williams v. Aetna Fin. Company, d.b.a. I.T.T. Fin. Services*, 83 Ohio St. 3d 464 (S.C. 1998) (presumption favoring validity of arbitration clause weakened ". . .when there are strong indications the contract. . .is an adhesion contract").

the announced policy of making arbitration agreements enforceable, not subject to specialized rules designed to eliminate them from broad sectors of the economy. As cited by the dissent below: "The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing' directly contrary to the Act's language and Congress' intent." *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

II. THE PETITION SHOULD BE GRANTED TO ADDRESS THE TIDE OF STATE COURT RULINGS THAT CONFLICT WITH THIS COURT'S RULING THAT ARBITRATORS MAY BE GRANTED EXPRESS AUTHORITY TO RESOLVE DISPUTES OVER ARBITRABILITY

In its 1995 decision in *First Options*, the Court addressed the question of "who" decides whether a dispute is arbitrable. It held that if the parties agreed by "'clear and unmistakable' evidence" to "submit the arbitrability question itself to arbitration," then "a court must defer to an arbitrator's arbitrability decision." 514 U.S. at 943, 944.

Since 1995, many courts have failed to apply the *First Options* ruling in cases where the arbitration agreement as a whole is attacked as unconscionable or invalid. The Alabama Supreme Court failed to do so below when it ruled that an arbitration agreement is "unconscionable" even where there is express contractual language stating that "all issues and disputes as to the arbitrability of claims must also be resolved by the arbitrator." (App. 3a.) That court proceeded to find that the arbitration agreement as a whole was unconscionable without first making any finding that the specific "arbitrability" clause – reserving "arbitrability" disputes to the arbitrators – was unconscionable or invalid on its own.

By its ruling, Alabama joined a growing list of other states whose highest courts have ruled that state courts can decide on their own whether an arbitration agreement is unconscionable even where the parties agreed upon an "arbitrability" clause that is not shown to be unconscionable or offensive in its own right. Many of these cases involve consumer loan agreements or other standardized contracts. *See, e.g., Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001) (court decides if arbitration agreement is unconscionable, despite "arbitrability" clause); *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 117, 27 S.W. 3d 361, 364 (Ark. 2000) (court decides arbitrability question, despite clause committing to the arbitrators the issue "whether the controversy or dispute is subject to arbitration," on basis of lack of mutuality of the general arbitration clause); *Results Oriented, Inc. v. Crawford,* 245 Ga. App. 432, 435, 538 S.E. 2d 73, 77 (App. 2000) (ruling that court may decide if an arbitration agreement is unconscionable despite "arbitrability" clause), *aff'd, Crawford v. Results Oriented, Inc.*, 2001 Ga. LEXIS 446 (Ga. June 11, 2001); *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 233, 511 S.E. 2d 854, 858 (W. Va. 1998) (court ruled that a consumer loan agreement's arbitration clause was unconscionable because it allowed the lender but not the borrower to seek judicial relief, in spite of language committing to the arbitrators disputes over "the validity and construction of the arbitration provision").

Several federal courts have also followed this trend.[9] These rulings appear to rest on the belief that it would be logically wrong to honor one part of an arbitration agreement – vesting "arbitrability" disputes to the arbitrator – until the court makes a prior determination that the arbitration agreement as a whole is valid.

Other courts, however, have concluded that a dispute over the validity of an arbitration agreement should be decided by the arbitrator when an "arbitrability" clause is present. *See, e.g., Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (because of "arbitrability" clause, arbitrators should decide whether the right to compel arbitration was "validly assigned" to the claimant); *Berkley v. H&R Block Eastern Tax Servs., Inc.*, 30 S.W.3d 341, 344 (Tenn. Ct. App.) ("Because the contract specifically states that the parties agreed to arbitrate the question of the validity or enforceability of the arbitration agreement . . . the parties must submit the question of arbitration to arbitration"), *applic. denied*, 2000 Tenn. LEXIS 621 (Tenn. 2000), *cert. denied*, 121 S. Ct. 1602 (2001). *See Paineweber, Inc. v. Bybyk*, 81 F. 3d 1193, 1202 (2d Cir. 1996) (language incorporated into arbitration agreement "commits all issues, including issues of arbitrability and timeliness, to the arbitrators").

The first and more numerous line of decisions are gutting the right of parties – recognized in *First Options* – to secure an

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[9] *See, e.g., Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 177 (3d Cir. 1999) (court decided unconscionability issue despite "arbitrability" clause); *Prevot v. Phillips Petroleum Co.*, 133 F. Supp.2d 937, 938, 941 (S.D. Tex. 2001) ("arbitrability" clause disregarded in ruling that arbitration agreement is procedurally unconscionable); *Dorsey v. H.C.P. Sales, Inc.*, 46 F. Supp.2d 804 (N.D. Ill. 1999) (court decides issue of "unconscionability" against borrower despite "arbitrability" clause).

efficient, arbitrated decision on the arbitrability of disputes, without a detour to court proceedings that may involve several levels of appellate review. Just as court decisions in earlier periods demonstrated hostility toward arbitration of disputes generally and impeded efficient resolution of disputes through arbitration, the latest wave of decisions evince hostility toward "arbitrability" clauses and toward efficient, arbitrated resolution of arbitrability disputes. *See, e.g., Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513, 521 (2000) (the FAA's "purpose" was "'to reverse the longstanding judicial hostility to arbitration agreements'"), *citing Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).[10]

Commentators have observed that "[t]his judicial regulation of arbitration agreements increases the dispute-resolution costs of the businesses with which consumers deal," and "this cost-increase, in turn, raises the prices consumers pay." Steven J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 90 (2001). Further, these rulings are based on flawed reasoning, which fails to give effect to both the express ruling in *First Options*, and this Court's approach in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), that has guided arbitrability jurisprudence for almost 35 years.

It is common ground that the validity of an "arbitrability" clause (granting the arbitrators the authority to decide if the other terms of the arbitration agreement are valid) itself may be challenged on grounds such as unconscionability, fraud in the

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[10] The Court has also stressed that "generalized attacks on arbitration rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants and as such, they are far out of step with our current endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer*, 500 U.S. at 30.

inducement, duress, or other "ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. This follows the Federal Arbitration Act's requirement that arbitration agreements shall be valid and enforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1999).

However, the next question is whether (a) an "arbitrability" clause embedded within an arbitration agreement may be invalidated by a court on grounds that the arbitration agreement as a whole is unconscionable, or (b) the court may only adjudicate whether the "arbitrability" clause is unconscionable on its own. The court below, along with like-minded courts, have not addressed this question. They simply assumed that "arbitrability" clauses may be ignored when the overall arbitration agreement is found by the court to be "unconscionable." This approach, however, strips the "arbitrability" clause of force because it vests the arbitrability decision in the courts in *every* case where the validity of an arbitration agreement is challenged.

The proper approach is for courts to address challenges to an "arbitrability" clause, embedded within an arbitration agreement, by determining only if such clauses themselves are unconscionable or otherwise invalid. This is the only approach consistent with *First Options* and general arbitrability principles set forth in *Prima Paint*. In *Prima Paint*, the Court ruled that *courts* may adjudicate "only issues relating to the making and performance of the agreement to arbitrate," such as claims that an arbitration clause was induced by fraud, but may not consider claims of fraud in the inducement of the contract generally. 388 U.S. at 403-04. The Court explained that arbitration agreements are "'separable' from the contracts in which they are embedded," and that where no claim is made that fraud was directed to the arbitration clause itself, "a broad

arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." 388 U.S. at 402.

The *Prima Paint* ruling was guided by the Second Circuit's earlier decision in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960), which viewed arbitration clauses as separable contracts. *See Prima Paint*, 388 U.S. at 399. The Second Circuit reasoned that "arbitration should not be denied or postponed upon the mere cry of fraud in the inducement, as this would permit the frustration of the very purposes sought to be achieved by the agreement to arbitrate, i.e. a speedy and relatively inexpensive trial before commercial specialists." 271 F.2d at 410. To the same effect, an "arbitrability" clause is nothing more than an agreement to arbitrate the single issue of arbitrability, contained within a more general agreement to arbitrate other disputes. It is "separable" from the general arbitration agreement in which it is "embedded," and should be subject to court review only on grounds that would render the "separable" contract invalid under state law. If the "mere cry" that the general arbitration agreement is unconscionable is sufficient to avoid the arbitrability clause, this too "would permit the frustration of the very purposes sought to be achieved" by such a clause, namely the efficient resolution of arbitrability disputes.

In the decision below, the Alabama Supreme Court never asked whether the "arbitrability" clause was invalid or unconscionable on its own. It did not find that any of the elements of unconscionability applied to the "arbitrability" clause itself. For example, there was no evidence cited that the clause was "unreasonably favorable" to the lender, or that an "arbitrability" clause by itself was inherently "oppressive" or "one-sided." (App. 21a.) Nor did the court below even employ

its own newly-announced "prevalence" test – there was no allegation, evidence, or any finding that all lenders included "arbitrability" clauses in their form contracts. There is no more reason to believe that arbitrators will enforce the law of "unconscionability" any less ably, or fairly, than other matters of substantive law affecting important statutory and common-law rights of consumers. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-81 (1995) ("Congress, when enacting this law, had the needs of consumers, as well as others in mind," and "arbitration's advantages often would seem helpful to individuals"); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("there is no reason to assume at the outset that arbitrators will not follow the law").

In sum, the Court's ruling in *First Options* has been widely misapplied. Unless an "arbitrability" clause itself is judicially determined to be unconscionable or otherwise invalid, the arbitrators should be the ones to decide if other aspects of the arbitration agreement are unconscionable or invalid.[11] The Court should review this case in order to address the tide of contrary rulings that are inconsistent with this Court's rulings, and which generate protracted judicial disputes over the validity of arbitration agreements notwithstanding "clear and unmistakable" contract language that forecloses such a judicial role. Review is especially needed because time is proving that,

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[11] Courts considering "unconscionability" of an arbitration clause have assumed it is the exclusive prerogative of the court to address: the issue relates to the "making" of the contract, a matter reserved for the court under section 4 of the FAA. This Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989), however, holds that rights under that Act – there the right to a court stay pending arbitration – may be varied or waived by agreement. The right to a judicial decision on the "making" of an arbitrability clause stands on no different footing and can be referred to arbitration by clear agreement of the parties.

as the number of standard form arbitration agreements signed by consumers and others continues to grow, so will the number of cases presenting unconscionability challenges to arbitration agreements.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for *certiorari*, and review the decision of the Alabama Supreme Court.

Respectfully submitted,

Stephen M. Truitt
Counsel of Record
Daniel I. Prywes
PEPPER HAMILTON LLP
600 Fourteenth Street, N.W.
Washington, D.C. 20005
(202) 220-1200

Stephen G. Harvey
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

Attorneys for *Amici Curiae*
American Financial Services Association,
American Bankers Association,
Consumers Bankers Association, and
The Financial Services Roundtable

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